(2)

Supreme Court, U.S.
FILED
NOV 4 1996
CLERK

No. 96-579

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

FRANK REYNOLDS, d/b/a/ Reynolds Fisheries, et al.,
Petitioners

v.

FRANCES S. BUCHHOLZER,
Director of Ohio Department of Natural Resources, et al.,
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BETTY D. MONTGOMERY
OHIO ATTORNEY GENERAL

Jeffrey S. Sutton
State Solicitor
Joan C. Weiser
Assistant Attorney General
Ohio Dept. of Nat. Resources
Counsel of Record
Fountain Square, D-2
Columbus, Ohio 43224
(614) 265-6870

9 pp

QUESTION PRESENTED FOR REVIEW

Whether Ohio conservation laws that do not differentiate between in-state and out-of-state commercial fishing interests violate the Commerce Clause.

PARTIES TO THE PROCEEDINGS

Petitioners:

Frank Reynolds, d/b/a/ Reynolds Fisheries, Port Clinton Fish Company and James Maricque.

Respondents:

Frances S. Buchholzer, Director of the Ohio Department of Natural Resources, succeeded in office by Donald C. Anderson on January 10, 1995; Richard B. Pierce, Chief, Ohio Division of Wildlife, succeeded in office by Michael J. Budzik on December 10, 1995; and George V. Voinovich, Governor of Ohio.

TABLE OF CONTENTS

	Page No.
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
REASONS FOR DENYING THE WRIT	1
CONCLUSION	3

TABLE OF AUTHORITIES

Page No.

Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371 (1978) 2

Burns Harbor Fish Co. v. Ralston, 800 F. Supp. 722 (S.D. Ind. 1992) 3

Hughes v. Oklahoma, 441 U.S. 322 (1979) 2

New York State Trawlers Ass'n v. Jorling, 16 F. 3d 1303 (2nd Cir. 1994) 3

Oregon Waste Syst. Inc. v. Dept. of Envtl. Quality of State of Oregon, 511 U.S. 93 (1994) 1

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 2

Reynolds v. Buchholzer, 87 F. 3d 827 (6th Cir. 1996) 2

Solis v. Miles, 524 F. Supp.1069 (S.D. Tex. 1981) 3

Other Authorities:

U.S. Const. art. I, § 8, cl. 3 . . . . . *passim*
Ohio R.C. 1533.63 1
Ohio Admin. Code 1501:31-3-01 1

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT AMONG THE LOWER COURTS.

The Petition should be denied because the Sixth Circuit opinion is not in conflict with any lower court authority. Petitioners simply have not alleged, much less shown, that there is any disagreement among the lower courts on the issue presented in the Petition.

II. THE LOWER COURT CORRECTLY REJECTED PETITIONERS' COMMERCE CLAUSE CLAIM.

In any event, the Sixth Circuit correctly rejected Petitioners' argument on the merits. Petitioners cannot establish a case of facial discrimination to Ohio R.C. 1533.63 and Ohio Admin. Code 1501:31-3-01 because the Ohio laws are neutral on their face. They treat in-state and out-of-state interests exactly the same; they do not draw any geographic lines; and as a result do not facially discriminate against interstate commerce. *Oregon Waste Syst., Inc. v.*

Dept. of Envtl. Quality of State of Oregon, 511 U.S. 93 (1994).

Nor can Petitioners properly claim that the laws place an undue burden on interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (where a state law "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142). A State's interest in conservation of wildlife clearly is a legitimate objective for state regulation. *Hughes v. Oklahoma* (1979), 441 U.S. 322; *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978). The Ohio laws further the important State objective of conservation of walleye and yellow perch in Ohio waters, and accordingly "[t]he local benefits of the [Ohio] law would appear to outweigh any burden on interstate commerce." *Reynolds v. Buchholzer*, 87 F.3d 827

(6th Cir. 1996); Petition, Appendix page A-6.

Other courts have reached the same conclusion in similar cases. *See New York State Trawlers Ass'n v. Jorling*, 16 F. 3d 1303 (2nd Cir. 1994) (upholding New York law that prohibits vessels equipped with trawler nets from taking lobster in Long Island Sound); *Burns Harbor Fish Co. v. Ralston*, 800 F.Supp. 722 (S.D. Ind. 1992) (upholding Indiana law that prohibits fishing with gill nets); *Solis v. Miles*, 524 F. Supp. 1069 (S.D. Tex. 1981) (upholding Texas law that prohibits commercial fishing of redfish and speckled sea trout in Texas waters).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BETTY D. MONTGOMERY
ATTORNEY GENERAL OF OHIO

Jeffrey S. Sutton
State Solicitor

Joan C. Weiser
Assistant Attorney General
Counsel of Record
Environmental Enforcement Section
Fountain Square, D-2
Columbus, OH 43224
(614) 265-6870